OCTOBER TERM, 1948

Office - Supreme Court, U. S.
FILED
MAR 31 1949
CHARLES ELMORE CROPLEY
CLERK

No. 680

GULFSTREAM PARK RACING ASSOCIATION, INC., A FLORIDA CORPORATION, AND GABLES RACING ASSOCIATION, INC., A FLORIDA CORPORATION,

Appellants,

vs.

HIALEAH RACE COURSE, INC., A FLORIDA CORPORATION, AND THE FLORIDA STATE RACING COMMISSION, A STATUTORY BODY CREATED UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

STATEMENT OF APPELLEES, HIALEAH RACE COURSE, INC., AND THE FLORIDA STATE RACING COMMISSION, OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

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APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

STATEMENT OF APPELLEES, HIALEAH RACE COURSE, INC., AND THE FLORIDA STATE RACING COMMISSION, OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

Appellees, Hialeah Race Course, Inc., and the Florida State Racing Commission, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, file this their statement

in opposition to appellants' statement as to jurisdiction. Appellees hereby include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the grounds that (1) the appeal is frivolous; (2) there is not presented a substantial Federal question; (3) there is no Federal question involved.

The matters here relied upon by the appellees are more particularly stated below:

1

The Appeal Is Frivolous

By law in Florida, pari-mutuel betting is permitted for a total of one hundred twenty (120) days at the race courses of the parties litigant hereto. In 1947 the Legislature passed an act providing that where three tracks are located within a radius of one hundred (100) air miles of each other, each race track is limited to a forty (40) day period and it divided said total 120 day season into three 40 day periods, commencing on December 1st of each year. Such act then provides for the manner in which the Racing Commission shall determine the allocation of said three periods. It is the latter provision of said act that is under attack in these proceedings.

Prior to the enactment of the act in question there was no statutory formula for the apportionment of racing dates. The law simply delegated the authority to the State Racing Commission to make such apportionment "in a fair and impartial manner".

The statutory formula for the allocation of such dates is designed to protect the revenues of the State arising from the tax on pari-mutuel betting at race tracks, and to promote the general welfare. It awards to the track producing the largest amount of tax revenue to the State for the

preceding year its choice of the three established racing periods, the track producing the second largest revenue gets the next choice and the track producing the third largest amount gets the remaining dates.

The reasons for and purpose of said act were clearly set forth therein by a legislative finding as follows:

1. That the operation of horse racing and legalized parimutuel and mutuel betting is a substantial business compatible to the best interests of the State and the taxes derived therefrom constitute an integral part of the tax structure of the State and counties.

2. That where two or more horse race tracks are located within a radius of 100 air miles of each other that the same cannot operate simultaneously without endangering the tax revenue derived therefrom.

3. That the power of the State Racing Commission to alter and vary racing periods from year to year as it may see fit is unsound and unwise and creates a condition of uncertainty which retards natural expansion and development of this business and affects the financial stability of the State and counties.

4. That it is declared to be the policy of the State of Florida that the danger to the growth and welfare of horse racing and to the tax structure of the State and counties be eliminated insofar as the discretionary power of the Racing Commission in allocating dates to horse tracks is concerned.

5. That the enactment is pursuant to and for the purpose of carrying out such policy; Chapter 23728, Laws of Florida, Acts of the 1947 Legislature.

When the Legislature established three forty day racing periods to be divided between three tracks within a given

area, it obviously became necessary to provide some method of allocating same. And in doing so the Legislature had in mind the welfare of the racing industry, the public generally and the tax structure of the State and its counties. In its wisdom, and to accomplish such objectives, it divided said 120 day racing season into three forty day periods and eliminated the discretionary powers of the Racing Commission.

The Legislature adopted a formula that removes from the realm of human vagaries the decision as to which track gets what dates. A definite yardstick is substituted that places a premium on performance. The reward, first choice, goes to the track producing the most tax revenue to the State. A competitive situation is created which encourages good management and top grade racing and the obvious beneficiaries are the racing industry, racing fans and the people of the State of Florida.

Some may say, as do appellants, that this formula was unwise, but this Court has repeatedly said that it is not concerned with the wisdom, need or appropriateness of legislation. That is a matter solely in the discretion of the Legislature. *Olsen* v. *Nebraska*, 313 U. S. 235, 85 L. Ed. 1305. *Valentine Goesart, et al*, v. *Cleary, et al*, 93 L. Ed. Advance Opinions #4, page 187. Appellants, in challenging said formula, say in effect that same is discriminatory because the track with first choice when the act became effective has a preference that would be difficult to overcome. This, however, is the pure conclusion of appellants because it serves the purpose of their argument. Potentially under the allocation formula any one of the three parties litigant have the right from year to year to make the first selection of said racing period because it is entirely possible that by initiative and good management any one of said tracks may produce the largest amount of tax revenue to the State of Florida as provided.

Assuming that it may be difficult for the appellants to secure the first choice of dates under said formula, even so this would not be sufficient for the Court to strike down said formula. Even though the application of a statute renders it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend, this does not violate the Fourteenth Amendment to the Constitution of the United States. *Gant* v. *Oklahoma City*, 289 U. S. 98, 77 L. Ed. 1058. Moreover, this Court has already passed upon a somewhat similar question adversely to the contentions of the appellants. In the case of *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853, the appellant contended that a regulation of the Director of Agriculture of Oregon, prescribing the only type of container in which raspberries and strawberries could be shipped, was arbitrary and discriminatory and denied to the appellant the equal protection clause of the Constitution because the appellant could not compete with other manufacturers of the type containers prescribed, that the effect of same was to grant a monopoly to those particular manufacturers of said type and that there was no necessity for the order based on considerations of public health, to prevent fraud or deception or any other legitimate use of the police power. However, this Court held that the order in question deals with a subject clearly within the police power of the State and reiterated the doctrine that

> " 'if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194, 209, 79 L. Ed. 281, 288,

55 S. Ct. 187. The burden is not sustained by making allegations which are merely the general conclusions of law or fact."

We might point out further that a motion to dismiss the appellant's bill of complaint was filed which was sustained and the appellant in that case contended that the appellee had admitted by the filing of the motion to dismiss all of the allegations of the bill of complaint with regard to the fact that there was no necessity for said order. Nevertheless, this Court held as we have above pointed out.

The Legislature of Florida clearly set forth its reasons for the passage of the act and the formula under attack is clearly related to such purposes and the simple conclusion of the appellant to the contrary should be of no avail. This Court has said that if there is any reasonable basis that can be conceived whereby an act can be sustained, in considering whether or not it carries out the purpose for which it was enacted, it must be sustained. *New York Rapid Transit Corp.* v. *New York*, 303 U. S. 571, 82 L. Ed. 1024. This Court has time and again sustained the power of a state to legislate in internal, commercial and business affairs and the philosophy of its decisions is clearly to the effect that state statutes and state boards concerned with racing, boxing, liquor, mining and factory safety, advertising, old age and child welfare, sanitation and health, drainage and tourism and similar subjects come under the jurisdiction of the highest state court for the interpretation of their powers and furthermore that states have the power to legislate against what are found to be injurious practices in their internal, commercial and business affairs and that due process is not to be so broadly construed that the Legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Lincoln Federal Labor Union #19129, American Federation of Labor, et al, v. *Northwestern Iron and Metal Company, et al; Whitaker, et al,* v. *State of North Carolina,* Volume 93, U. S. L. Ed., Advance Sheet #5, page 201, text page 207 and 208; *American Federation of Labor, et al,* v. *American Sash and Door Company, et al,* Volume 93, U. S. L. Ed., Advance Sheet #5, page 209, text page 212. Furthermore, the Court indicates its disapproval of the two cases cited by the appellants, to-wit: *Adams* v. *Tanner,* 244 U. S. 590, 27 Sup. Ct. 662, and *Truax* v. *Corrigan,* 257 U. S. 312, 42 Sup. Ct. 124.

2

There Is Not Presented a Substantial Federal Question

In this argument we do not mean to concede that any federal question is involved in this appeal, particularly in view of the fact that the Supreme Court of Florida did not consider or pass upon any federal question. Furthermore, it was not necessary for it to do so in arriving at its conclusion. Appellants' argument that there is a substantial federal question involved is quite specious. The climax of this argument is that there is a substantial federal question involved because the Judge of the Circuit Court of Dade County and three Florida Supreme Court Justices held the act unconstitutional. We respectfully submit that this statement is not sustained by the facts and in any event, it is not indicative that there was a substantial federal question involved. It is to be noted that the Circuit Court of Dade County, in its order denying the appellees' Motion to Dismiss the Bill of Complaint, which was appealed, set the cause for a pre-trial conference, which conference would be comparable to those held under the Federal Rules of Civil Procedure and also set it for trial upon its

merits. The three Justices of the Supreme Court who dissented from the opinion did not give their reasons therefor.

We are surprised that appellants disregard the well-established principle that the majority opinion of the Supreme Court of a state becomes the law of the state. What any number of lower Court Judges might have held is wholly beside the point. This is one formula that cannot be questioned, and the argument is as specious as the attack on the allocation formula in the Statute.

In providing a formula for the allocation of racing dates, the Florida Legislature exercised a power peculiar to a state. Racing is permitted as a matter of license and not of privilege and some method of fixing the season and dividing the dates had to be devised by legislative act, either directly or by authorizing a Board of its own creation so to do. It chose the former. Probably no method would have been satisfactory to all, but the Legislature, in its wisdom, and to protect the tax structure of the state and the general welfare determined this to be the best method. That they have such power is clearly established by the cases heretofore cited under Point 1 and in other opinions of this Court such as that in the case of *L'Hote* v. *New Orleans*, 177 U. S. 587, 20 Sup. Ct. 788, 791, 44 L. Ed. 899.

3

There Is No Federal Question Involved

We have in our previous comments attempted to demonstrate that there is no substantial Federal question whatsoever involved. Our argument upon Points 1 and 2 touches this somewhat but to elaborate briefly, we think it can be said with certainty that this Honorable Court is extremely reluctant to interfere with legislation enacted by one of the sovereign states dealing with and relating to the operation of a business within the confines of such state.

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This we think is particularly true with reference to state legislation enacted under the police power and the taxing powers of a state when the subject of such legislation is a business charged with a definite public interest. A much stronger case was presented to this Court in a petition to review the decision of the Supreme Court of Louisiana in the case of *Louisiana Greyhound Club* v. *Clancy,* 119 So. 532, 120 So. 295, in which this Court refused to take jurisdiction. Affirmed in 74 L. Ed. 593.

In this case there was under attack a legislative act which, among other things, provided that racing could not be conducted on any track measuring less than one mile. The track sought to enjoin the enforcement of said act against it, claiming the expenditure of $135,000.00 in constructing on oval track of less than a mile, in cluding all necessary on oval track of less than a mile, including all necessary apparatus. The petitioner further maintained that the Fourteenth Amendment to the Constitution of the United States was violated in that plaintiff was deprived of liberty of contract and of its property without due process of law. Not only did the Supreme Court of Louisiana find this contention unsound, but the refusal of this Court to grant certiorari is indicative of the fact that it did not believe that any federal question was involved. The Supreme Court of Louisiana had held that even though private rights of persons or property are subjected to restraint, or that loss will result to individuals from its enforcement, this does not render such a state statute unconstitutional.

In the instant case the appellants have not shown and cannot show that they stand to suffer any damage by the application of the formula under attack other than a highly speculative one. There is no contention that the appellants are denied racing dates that they have previously enjoyed. They can do no more than speculate as to whether, if they had a particular choice of racing dates, they would earn

any larger sum of money than they have heretofore made.

When boiled down appellants are merely questioning the wisdom of the Legislature. They disagree with its findings and challenge its policy. But as this Court has said, it is not the province of the court to determine where the truth of the argument lies. If the subject is fairly debatable, the determination of the Legislature is conclusive. *Max Factor & Co.* v. *Junsman*, 299 U. S. 198, 57 S. Ct. 147, 81 L. Ed. 122.

Wherefore, the appellees submit this statement showing the appeal to be frivolous; that the question is not a substantial federal one; and, that there is no federal question involved; and repectfully moves the Court to dismiss the appeal or in the alternative to affirm the decision of the Supreme Court of the State of Florida entered herein.

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